Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

MARLIN DAVIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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January 8, 2001

Appendix G

[Entered January 8, 2001]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

vs. 4:92cr4013-WS
4:99cv522-WS

MARLIN DAVIS,

Defendant.

_____/

REPORT AND RECOMMENDATION

Pending in this case is a motion to vacate and set aside a sentence filed pursuant to 28 U.S.C. § 2255. Docs. 1325 and 1326 (memorandum). The United States filed a response. Doc. 1369. Defendant filed a reply. Doc. 1382. Defendant also filed the briefs on direct appeal. Doc. 1384.

Also pending is Defendant's motion to interview the jurors concerning their exposure to pretrial publicity. Doc. 1383. This motion relates to grounds three through five in the § 2255 motion. The government objects. Doc. 1415.

Finally, a motion to file a supplemental amendment to bring a claim based upon Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) is pending. Doc. 1395. The amended claim has been docketed as document 1394. The Government does not oppose the motion

to amend. Doc. 1415.

Ground One

The indictment charged in Count I that Defendant conspired with others to possess with intent to distribute marijuana, cocaine, and crack cocaine in violation of 21 U.S.C § § 841(a)(1) and (b)(1)(A)(iii). Doc. 848 (indictment), p.2. A general verdict was returned without specifying which of the three illegal substances was the object of Defendant Marlin Davis's conspiracy, or what amounts. Defendant was sentenced for crack cocaine, the illegal substance with the highest statutory maximum sentence.

Defendant contends that he was deprived of effective assistance of counsel because his trial lawyer did not object that he should have been sentenced based upon the lowest statutory maximum sentence, the sentence for marijuana. The claim arises from Edwards v. United States, 523 U.S. 511, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998), a case decided two years after Defendant's trial. The issue was not raised on direct appeal either, though Petitioner had the same attorney who now represents him in this § 2255 motion and Edwards was decided while the appeal was still pending.[1]

A claim of the ineffective assistance of counsel requires proof of both attorney error and prejudice to the outcome. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2D 674 (1984). With regard to attorney error, "[t]he court must...determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance...[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and

[1] Edwards was decided on April 28, 1998. Defendant's conviction was affirmed on June 26, 1988, and rehearing was denied on August 25, 1998. Docs. 1250 and 1252.

made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. "Judicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689, 104 S.Ct. at 2065. "[E]very effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

To show prejudice, a claimant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S.Ct. at 2068. Failure to demonstrate either inadequate performance or prejudice to the outcome is dispositive of the claim against the petitioner. 466 U.S. at 697, 104 S.Ct. at 2069.

Defendant Marlin Davis's trial was held from February 26, 1996, through March 8, 1996. Doc. 1044-1112 and 1120. Edwards involved a charge of conspiracy to distribute both cocaine and cocaine base. 532 U.S. at 512-513, 118 S.Ct. at 1476. The jury was instructed that they could convict of the conspiracy charge if the conspiracy involved cocaine *or* cocaine base. A general verdict was returned, and the trial court imposed a sentence based upon involvement with both cocaine and cocaine base. *Id.*, 118 S.Ct. at 1477. The defendant argued he should have been sentenced for cocaine only since the jury was permitted to convict for cocaine *or* crack cocaine, and it was impossible to tell upon which the verdict was based. The Court held, however, that the Sentencing Guidelines provide that the judge determines the amount and types of drugs for purposes of sentencing. 532 U.S. at 513-514, 118 S.Ct. at 1477.

Defendant then argued that the judge must assume the more lenient the verdict, that the jury convicted only of

cocaine. 532 U.S. at 514, 118 S.Ct. at 1477. The Court held, however, that the judge must also consider relevant conduct. *Id.* It then found that the amount of cocaine, considered separately, was enough so that the sentence imposed was under the maximum authorized by statute for a cocaine only conspiracy. 532 U.S. at 515, 118 S.Ct. at 1478. In so doing, it pointed out that the "statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permitted for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines." *Id.*, 118 S.Ct. at 1477.

The Edwards case has been applied in one case in this circuit, a case also decided two years after Defendant's trial, but while Defendant's appeal was still pending. United States v. Riley, 142 F.3d 1254 (11th Cir. 1998).[2] In Riley, the defendants challenged their sentences on direct appeal because they were convicted by a general verdict of a conspiracy involving both powder cocaine and crack cocaine. No request for a special verdict had been made, so the court reviewed for plain error. 142 F.3d at 1255. The trial court had found that defendant Riley was involved with two kilograms of crack cocaine and twelve kilograms of powder cocaine which, when combined and given a marijuana equivalency, produced a base offense level of 38. *Id.* Riley argued that the court had to assume that he had been convicted of a conspiracy involving the powder cocaine only. *Id.*

The court found these facts indistinguishable from Edwards. *Id.* Since neither Riley nor his codefendant contended "that either crack or powder was absent from their course of conduct," and since the evidence was "overwhelming" that they processed powder cocaine into crack cocaine, the court found no error. *Id.* 1256-1257.

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[2] Riley was decide on June 3, 1998.

The only other case of importance in this circuit seems to be United States v. Dennis, 786 F.3d 1029 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987), a pre-Guidelines case decided long before Defendant's trial. In that case, the defendant was charged with a conspiracy to possess with intent to distribute heroin, marijuana, cocaine, and Talwin.[3] 786 F.2d at 1037. If either heroin or cocaine had been the object, the maximum sentence was 15 years, but if marijuana was the object, the maximum was 5 years. *Id.* at 1038. Defendants had unsuccessfully sought a special verdict, specifying which drugs were found to have been the object of the conspiracy, and this was raised as error. The court said:

> Where a section 846 conspiracy count charges the defendants with conspiring to distribute two or more drugs for which Congress has prescribed different ranges within which the sentence imposed may fall, the trial judge should, by use of a special interrogatory or otherwise, require the jury to return a verdict on the conspiracy count that will indicate clearly on its face which of the charged drugs the defendants were found by the jury to have conspired to distribute. In the absence of such a verdict, it may well be impossible in many cases for the sentencing judge to determine which drugs the jury found to have been involved.

786 F.2D at 1038.

But the court also found no error since "the evidence is overwhelming" that the object of the conspiracy was heroin and cocaine, and no evidence had been identified that the conspiracy was limited to drugs for which a maximum

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[3] Talwin is a pain medication. United States v. Mahar, 801 F.2d 1477, 1486 (6th Cir. 1986).

sentence of 5 years was authorized. *Id.* The court warned, however, that if evidence had been submitted relating to "both marijuana and heroin or cocaine," then the verdict would be ambiguous. *Id.* at 1041. The court did not specify the remedy.

There have been a number of cases from the circuits addressing this question, both before and after Edwards. These need not be examined here, however, as it is plain that ineffective assistance of counsel has not been shown.[4] Edwards made it clear that the sentencing judge determines drug types and amounts, and said that there would be a problem only if there was evidence that one of the objects of the conspiracy was a controlled substance for which there was a statutory maximum sentence lower than the sentence imposed.

Defendant makes no argument that the evidence concerning powder cocaine, as an object of the conspiracy was insufficient to authorize a maximum sentence of life imprisonment. The c laim, therefore, depends entirely upon the marijuana evidence.

Defendant argues that the Government submitted evidence to the jury that the conspiracy had as its object the distribution of marijuana. Doc. 1326, p. 2. Cited for this are the following portions of the transcript: Doc. 1105 (vol.), pp. 132, 139, 151, 152; doc. 1107 (vol. 7), pp. 192, 212: doc 1120 (vol.8), pp. 17, 18, 19, 27; doc. 1110 (vol. 11), p. 224. The testimony on these pages has been carefully examined and it only concerns personal possession or use of marijuana by the witnesses, evidence which was elicited not by the Government, but on cross-examination by attorneys for Defendants to discredit the witnesses. The one exception is

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[4] It is arguable that the claim should be directed to appellate counsel, for failing to argue Edwards and Riley while the appeal was still pending. Still however, neither attorney, trial or appellate, committed attorney error because the claim was without merit.

testimony of Gregory Matthews, where he admitted to "selling" and smoking marijuana, but again this was elicited by Defendants in an attempt to discredit Matthews. Doc. 1120, p. 16. It was not evidence presented by the Government. The citation to page 224 of doc. 1110 is a reference to the use of marijuana by Government witness Lee Roy Smith. Although it was revealed by the Government on redirect, it was merely a rehash of the same sort of discrediting testimony brought out on cross examination. Doc. 110, p. 219.

In short, while a different case might be presented had the Government presented any evidence of a conspiracy to possess with intent to distribute marijuana, here the Government put on *no* evidence that marijuana was an object of the conspiracy.[5] Thus, there is no ambiguity about the jury verdict to with respect to whether the jury could have found that Defendant conspired to possess with intent to distribute marijuana.

Stated another way, had Defendant been charged only with a conspiracy to possess with the intent to distribute marijuana, he would have been entitled to a judgment of acquittal. The jury, therefore, must have convicted him only of involvement with cocaine and crack cocaine.

Consequently, the concession of sentencing by Defendant's attorney, that there was no marijuana in this case, was not attorney error. Nor could there have been prejudice to the outcome, given the status of the record discussed above. The was no evidence at all that marijuana was the object of the conspiracy.[6]

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[5] "Judge, as far as marijuana, there was no marijuana in this case, but Count I mentions that he was also convicted of intent to distribute marijuana." Doc. 1073 (vol. 14, sentencing transcript), p. 9.

[6] This distinguishes the result recommended by Magistrate Judge Davis in case number 3:96cr93-LAC. Doc. 165 (report and recommendation), attached to doc. 1419 as supplemental authority. Apparently in that case there was *some* evidence that distribution of the with the lower penalty,

Ground Two

Defendant contends that his trial attorney was ineffective for failing to object to the lack of adequate specify of the court's findings that he was involved with at least 1.5 kilograms of crack cocaine, and to the two level enhancement for firearms. Such objections must be made at the end of sentencing as required by United States v. Jones, 899 F.2d 1097 (11th Cir. 1990). Doc. 1326, p.6; doc. 1382, pp. 3-4 ("if court appointed counsel had objected stating the particulars as required by *Jones*, the trial court would have been required to make appropriate and specific findings.")

On direct appeal, the Government argued that the question of drug quantity for sentencing was not preserved by an objection at sentencing, and then argued that the claim could not be raised for the first time on direct appeal. Doc. 1384, Government's brief on appeal, p. 44 (Since he did not object to the amount set out in the PSR and did into challenge that amount during sentencing, he should not be allowed to raise it now for the first time.") The Eleventh Circuit affirmed without opinion. Doc. 1252.

In response to this § 2255 claim, the Government now points out that Defendant's attorney did object at sentencing to the quantity of crack cocaine attributed to Defendant by the presentence report.[7] Doc. 1369, p. 5. Defendant's attorney challenged the drug quantities and his agreement to participate in the broader conspiracy. Doc. 1073 (vol. 14), sentencing transcript), pp. 3-4, 13-14. The firearm

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amphetamine, was the object of the conspiracy. The report and recommendation has not yet been adopted by Judge Collier.

[7] If an objection concerning a sentencing factor is clearly made during sentencing, that objection need not be repeated at the end of sentencing to preserve the basic claim for appellate review. United States v. Maurice, 69 F.3d 1553, 1557 (11th Cir. 1995) (emphasis added, footnote omitted). The claim here, however, is procedural, to the specificity of the court's findings. There was no objection at all to that.

enhancement was not mentioned by counsel at sentencing, however. *Id.* Further, Defendant's counsel did not object after sentencing to the court's findings as to the question of drug quantities and the firearm enhancement. *Id.*, p. 25.

"[A] member of a drug conspiracy is liable for his own acts and the acts of others in furtherance of the activity that the defendant agreed to undertake and that are reasonably foreseeable in connection with that activity." United States v. Lee, 68 F.3d 1267, 1274 (11th cir. 1995), *quoting*, United States v. Ismond, 993 F.2d 1498, 1499 (11th Cir. 1993). "[T]o determine a defendant's liability for the acts of others, the district court must first make individualized findings concerning the scope of criminal activity undertaken by a particular defendant. Once the extent of a defendant's participation in the conspiracy is established, the court can determine the drug quantities reasonably foreseeable in connection with that level of participation. *If the court does not make individualized findings, the sentence may nevertheless be upheld if the record supports the amount of drugs attributed to a defendant.*" *Id.*, 68 F.3d. at 1274-1275, *quoting*, Ismond, 993 F.2d at 1499 (emphasis added).

Thus, even if Defendant's attorney had objected to the court's findings at the end of sentencing, and assuming those findings were incomplete, the Eleventh Circuit would have reversed only if the record did not support the amount of crack cocaine or the firearm enhancement found by the court. To show the sort of prejudice now, Defendant must come forward with detailed argument pointing the record to show that the result would have been different if his trial lawyer had made the objection which his § 2255 lawyer now makes. *See*, Reece v. United States, 119 F.3D 1462, 1468 (11th Cir. 1997) (defendant could satisfy Strickland burden to show prejudice "only if he represents that, given an evidentiary hearing, he can establish that the methamphetamine he possessed and distributed was the L-type. Reece makes no such representation.").

Defendant has not made such a showing. As to drug quantity, the Government argued at sentencing that Defendant was responsible for:

(1) One kilogram of crack cocaine stored at the residence of the sister of Michelle Kennedy. Doc. 1073, p. 10 (testimony of Gregory Matthews).

(2) Kilogram quantities of both powder and crack cocaine distributed to Jimmy Nixon. *Id.*, p. 11 (testimony of Jimmy Nixon).

(3) One kilogram of crack cocaine brought to Wadley, Georgia. *Id.* (testimony of Michelle Kennedy and Leroy Smith)

(4) Between one-quarter and one-half kilogram of crack cocaine transported by Gregory Matthews and Defendant from South Florida to Marianna, Florida. *Id.* (testimony of Gregory Matthews).

(5) At least four trips carrying various amounts of crack cocaine from South Florida to Wadley, Georgia. *Id.* (testimony of Telly Savales Carswell).

In his motion but not in either memorandum, Defendant only contests the findings as to items (3) and (4) above. Doc. 1, p. 5. Even if the 1.5 kilograms of crack cocaine potentially evidenced by the testimony described in paragraphs (3) and (4) had been disbelieved by the court. Defendant has not shown that the record would not have otherwise supported a finding that Defendant was involved with at least 1.5 kilograms of crack cocaine based upon the evidence described in items (1), (2) and (5).

The firearm enhancement claim suffers the same fate. During sentencing, the Government said that Defendant was responsible for firearms due to the testimony of Gregory Matthews. The Government said that Gregory Matthews,

Emerson Davis, and Defendant went to Michelle Kennedy's sister's house to retrieve a kilogram of crack cocaine which had been given to Michelle Kennedy to store, and Matthews and Emerson Davis brandished firearms. Doc. 1073, p. 10. In his motion, Defendant sets forth some of the testimony of Gregory Matthews. Doc. 1325, p. 6. In this testimony, Matthews said that he and Emerson Davis went to Kennedy's sister's house armed with handguns, and he said "Marlin was there too, but I can't place him with a gun." *Id.* Matthews then said "Nothing really happened. We didn't have any gunplay or anything. We just go in there, you know." *Id.*, p. 7.

This exposition of evidence is incomplete. Gregory Matthews said that in 1991, Emerson Davis (Mercy) had asked Michelle Kennedy to keep some "dope" at Kennedy's sister's house. Doc. 1107 (vol. 7), pp. 155-156, 158. He said "they" had returned from Marianna and Michelle Kennedy was "missing." *Id.*, p. 156. Matthews then said that "[n]ormally when we leave Fort Lauderdale, I travel with my gun, he [Emerson Davis] travel with his. I don't know about Marlin." Doc. 1107 (vol. 7), p. 157. They both had "Glocks." *Id.* Matthews said Emerson Davis told them:

> Any sign of anybody else that know about us and our doings show up around there or anything while we trying to get this back, we were – anything come up, any action had to be taken, it was gonna go, you know.

Id., pp. 157-158. In other words, while Matthews did not say that the guns were brandished, it is plain that Emerson Davis told Matthews and Defendant that the guns were to be used if any trouble started as they retrieved the cocaine.

Second, at sentencing the Government said that Jimmy Nixon had testified that Defendant himself carried a pistol. *Id.*, p. 11. Defendant has not argued that this testimony was insufficient for the court's findings.

The court reasoned that Defendant was accountable for the firearms in the possession of Emerson Davis and Gregory Matthews, finding: "Certainly, he was present with two other coconspirators who had weapons." *Id.*, p. 16. The only way this finding might have been successfully challenged on appeal would have been if Defendant had come forward with some record evidence that he could not have reasonably foreseen that Matthews and Emerson Davis were carrying firearms when all three went to retrieve the cocaine. Actual knowledge is not necessary, as long as the coconspirator's firearm possession in the furtherance of the conspiracy and was reasonably foreseeable to the defendant. United States v. Gallo, 195 F. 3d 1278, 1284 (11th Cir. 1999). Defendant has not made such a showing. The evidence at trial showed that all three knew what they were doing that day, and that Emerson Davis and Gregory Matthews were armed and prepared to shoot if there was any trouble. Further, there is the testimony of Jimmy Nixon, which has not been challenged at all.[8] Ground two, therefore, is without merit.

Ground Three

Defendant contends that his trial attorney was ineffective for failing to object to numerous references to the ethnicity of Defendants and other conspirators. Defendants and their associates in the crack cocaine trade were frequently called "Jamaicans," while convicted drug dealers who were from North Florida or Georgia were called "Americans." Defendant contends that his attorney committed error by failing to object, and argues that the lack of an objection caused prejudice at trial.

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[8] *Cf.*, Castillo v. United States, 200 F. 3d 735, 737 and n. 2 (11th Cir. 2000), *cert. denied*, __ S. Ct. __, 121 S. Ct. 114 (2000) (upholding a § 924(c) conviction, finding it "reasonably foreseeable that [the codefendant] would carry a firearm because, as we have previously stated, 'weapons have become tools of the trade for those involved in the distribution of illegal drugs.'") (citation omitted).

The Government argues that since the *fair trial claim* was raised on direct appeal, it cannot be considered on this § 2255 motion. Doc. 1369. That, of course, is not the claim now. The ineffective assistance of counsel claim faults counsel for not preserving the standard of review on appeal.[9] The Government did not address the merits of the ineffective assistance of counsel claim. The claim now before the court, however, is governed by Strickland. To reiterate, to show prejudice a claimant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S.Ct. at 2068.

The Government did repeatedly ask witnesses to testify as to whether various members of the conspiracy were of Jamaican heritage. Defendant has cited a number of cases which express disapproval where there has been a danger that the jury might convict for ethnicity rather than actual guilt. But the court's task on this post-conviction motion is to ask:

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[9] A *preserved* claim that a trial court's ruling has deprived a defendant of a fundamentally fair trial is reviewed for an abuse of discretion. United States v. Mayes, 158 F.3d 1215, 1219 (11th Cir. 1998), *cert. denied*, 525 U.S. 1185 (1999). "The abuse of discretion standard has been described as allowing a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." United States v. Kelly, 888 F.2d 732, 745 (11th Cir. 1989). The fair trial claim, however, was not preserved by an objection by Defendant's attorney, and therefore it was reviewed for plain error. United States v. Hernandez, 896 F.2d 513, 523 (11th Cir.), *cert. denied*, 498 U.S. 858 (1990); doc. 1384, brief on appeal, p. 10. Plain error has four requirements. "First, there must be an error. Second, the error must be plain. Third, the error must affect substantial rights of the defendant. Fourth, the error must seriously affect the fairness, integrity, or public reputation of a judicial proceeding." United States v. Humphrey, 164 F.3d 585, 588 n. 3 (11th Cir. 1999), citing, United States v. Olano, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993). The Eleventh Circuit's per curiam denial of this claim must have used the plain error standard.

If Defendant's attorney had objected at the outset, and if the court had sustained the objection and instructed the Government to stay completely away from references to Jamaican heritage. Defendant has cited a number of cases which express disapproval where there has been a danger that the jury might convict for ethnicity rather than actual guilt. But the court's task on this post-conviction motion is to ask: If Defendant's attorney had objected at the outset, and if the court had sustained the objection and instructed the Government to stay completely away from references to Jamaican heritage, is there a "reasonable probability" that the outcome for Defendant would have been different? The court cannot tell. Defendant does not discuss the evidence against him at all. Stated another way, Defendant has not laid out the evidence against him by specific references to the record to show that it was insufficient to convict of conspiracy without the repeated references to Jamaicans. Defendant must come forward with evidence or argument which his lawyer should have presented which probably would have changed the outcome. Defendant cannot just generally allege prejudice. Reece, *supra*.

The undersigned did not hear the evidence in this case and has not read all of the transcripts. But the description by the parties of the evidence at trial is in the appellate briefs and is presumptively accurate. Doc. 1384, Defendant's initial brief, pp. 4-10; Government's brief, pp. 4-12. There was evidence that Marlin Davis worked for Emerson Davis in the sale of crack cocaine in Marianna, Florida. Government's brief, p. 8. He also sold crack cocaine through Patricia Clark and Jimmy Nixon in Savannah, Georgia, and he arranged for Nixon to purchase a kilogram of cocaine from Emerson Davis. *Id.* He helped Gregory Matthews take cocaine to Emerson Davis in Marianna. *Id.* He also helped stash cocaine and guarded money. *Id.*, p. 9. When Emerson Davis could not find cocaine from his usual sources, he bought from Marlin Davis. *Id.* Marlin Davis was seen both counting money for Emerson Davis and bagging up the

drugs. *Id.* He helped Gregory Matthews and Emerson Davis go to Michelle Kennedy's house to retrieve cocaine which Emerson Davis feared was stolen from him. *Id.* Marlin Davis talked with Emerson Davis and Gregory Matthews about expanding the business to Georgia. *Id.* He employed Telly Savalas Carswell to sell drugs for him in Wadley, Georgia. *Id.*, pp. 9-10. Defendant has not discussed any of this evidence to show that the testimony was weak in any respect.

Finally, "[a]n unembellished reference to evidence of race simply as a factor bolstering an eyewitness identification of a culprit . . . poses no threat to purity of the trial. The line is crossed, however, when the argument shifts its emphasis from evidence to emotion." United States v. Cabrera, 222 F.3d 590, 595 (9th Cir. 2000), *quoting*, United States v. Doe, 903 F.2d 16, 25 (D.C. Cir. 1990). In Doe, the court described the testimony as follows:

> Rawls [the police witness] avowed that "the retail market has been taken over basically by Jamaicans," and that "the local dealers were being replaced . . . by groups of people that were coming in from other places," who "in many cases" were Jamaicans. These statements hardly described for the jury the modus operandi of drug dealers, Jamaican or otherwise, nor could they have provided legitimate assistance to the jurors in determining whether appellants committed the offense charged. Instead, they focused on monopolization of the local drug market by dealers tracing their ancestry to Jamaica, and strongly suggested that appellants were guilty because two of them are Jamaican.

903 F.2d at 20.

This case, however, is not like the Doe case. There was no opinion testimony in this case about the take-over of the local drug market by dealers of Jamaican ancestry. Even though there were a number of references to the Jamaican heritage of certain witnesses or co-conspirators, to "American dudes" by other witnesses, and to nicknames, the purpose was mere identification of persons or, as brought out by defendants, the explanation of a nickname. All of the members of the conspiracy who came to Marianna from Fort Lauderdale were of Jamaican heritage. Doc. 1384. Government's brief, p. 7. This was an identifying factor which would have been difficult to avoid at trial. Jamaican English is distinctly different from the Southern speech of many black residents of Jackson County, Florida.[10] Witnesses who saw these persons selling drugs unavoidably would have noted their skin color, gender, size, age, and regional accent. None of the references to ethnicity that have been cited by Defendant are references to anything but identity. At no point was there any reference to ethnicity which suggested that Defendant was probably guilty due to his ethnicity. It is true that the jury could have concluded from the evidence that the members of this conspiracy took over the local drug market, but it was not because they were Jamaicans. It is very doubtful that the jury would have concluded that Defendant Marlin Davis was guilty of a conspiracy with the others merely because he had come from Jamaica. Ground three, therefore, is without merit.

Grounds Four and Five

The next two grounds are related and should be considered together. In ground four, Defendant contends that his attorney was ineffective for failing to seek a change of venue due to pretrial publicity. Defendant contends that newspaper articles had falsely accused Defendant's brother and co-defendant, Emerson Davis, of murdering Florida State

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[10] Marianna, Florida, is the county seat of Jackson County.

Trooper Fulford. He also argues that the newspaper publicity caused him prejudice by alleging that he was a member of a Jamaican gang which had caused the trooper's death. Finally, Defendant asserts prejudice because the mother and widow of the murdered trooper attended his trial.

On June 9, 1995, an article was published on the front page of the Tallahassee Democrat. Doc. 1325, p. 13. It was entitled "A Final Arrest in Trooper's Murder," and described the arrest of Emerson Davis. The article quoted Supervisory Investigator Harry A. Layne, speaking for the United States Marshals Service in Tallahassee, saying that Emerson Davis "ordered the construction of a pipe bomb to kill two female members of his drug group in 1992." The article further described Emerson Davis as "a primary leader of the Jamaican drug gang based in Fort Lauderdale that ordered the pipe-bomb execution." The article said that Paul Howell had been convicted of the murder and sentenced to death.

A second article is also described in the motion. The article ran on the front page of the Tallahassee Democrat on September 27, 1994. *Id.*, pp. 14-15. The article discussed a change of venue in the state trial of the Howell brothers. The trial was originally set for Monticello, in Jefferson County, Florida. A resident of Monticello was quoted as being relieved that the trial would be moved to another venue, stating "[t]his is any awfully small town and it's just a very emotional matter right now." *Id.*, p. 15. The article further mentioned "two articles in Sunday's Tallahassee Democrat, one of which 'proceeds to link the defendants to a Jamaican posse who may attempt a rescue,' and 'the other article (which) makes as a central feature the allegedly racially prejudicial sentiment in the community." *Id.*

A third newspaper article was described in the motion. It was dated September 18, 1994, on the front page of the Sunday Democrat. The gist of the headline was that the widow of Trooper Fulford could find "lost peace of mind" because the Howell brothers were going to trial for the

murder of Fulford. *Id.*, p. 15. The article quoted Fulford's widows as saying: "She says she wants brothers Patrick and Paul Howell to die in the electric chair." *Id.* The article stated that the Howells "were members of a Jamaican drug ring responsible for three deaths in a six-month period." *Id.*, p. 16. The article stated that Fulford's widow had attended the eight week federal trial in May and June, 1993, and planned to attend this state trial. *Id.* The article concluded that "[t]he Howells were among eight Jamaicans who were handed life sentences in that trial." *Id.*

Copies of all of the newspaper articles are attached as Appendix B to the motion. The one closest in time to the trial in this case is the first one, June 15, 1995. All of the rest, for the most part, are dated in the fall of 1994. In summary, there was a lot of newspaper coverage of the story in the fall of 1994, but only two articles in 1995, one on January 11, 1995, and the last described above, when Emerson Davis was arrested, dated June 9, 1995, over eight months before Defendant's trial.

In ground five, Defendant contends that his attorney was ineffective for failing to conduct sufficient voir dire of the prospective jurors regarding pretrial publicity. Defendant contends that one member of the jury was an employee of the Tallahassee Democrat, but no questions were asked of that juror outside the hearing of other prospective jurors as to whether she had learned of the newspaper articles through her employment. He alleges that other jurors subscribed to the Tallahassee Democrat, but they were not asked if they had read the articles.

The transcript of the selection of the jury reveals that the court first described the nature of the charges against Defendants. Doc. 1104, vol. 4, pp. 5-6. The court then said it would name the witnesses who might be called. *Id.*, p. 6. The court said "I asked the lawyers to give me the names, so when the jury is being selected, that if there is something about one of these names that provokes some response on

your part, makes you think that you could not be a fair and impartial juror, you should let us know." *Id.* The court had already identified Emerson Davis and Marlin Davis as the defendants. *Id.*, p. 5. After reading the extensive potential witness list, which contained the name of Patrick Howell, the court set forth the expected length of the trial and then said: "Is there anybody seated in the jury box who believes they have a good reason why they cannot be here to be a juror in this case?" *Id.*, p. 13. That question elicited a response from one juror concerning hardship. *Id.*, pp. 13-14. None of the seated jurors then came forward with anything concerning the nature of the charges or the names of the prospective witnesses to indicate any misgivings about serving.

When the first twelve prospective jurors were seated, Defendant's attorney, Steve Glazar, asked if any of them subscribed to the Tallahassee Democrat. Of the jurors eventually selected, Jurors Brooks, Colson, and Andrews said that they subscribed to the Tallahassee Democrat. Doc. 1104, vol. 4, p. 41. The question was not asked of the other jurors who were seated after the first six were excused. Mr. Glazar asked no questions of Brooks, Colson or Andrews concerning their reading habits of the Tallahassee Democrat.

At one point, prospective juror Carl Tucker revealed that he worked at the Federal Detention Center (FDC) at FCI Tallahassee. Doc. 1104, vol. 4, p. 90. The attorney for Emerson Davis, Timothy Jansen, said that while he did not want to ask questions of everyone on the record, he thought that Tucker should be asked if he had seen Defendants at the Federal Detention Center or whether he was "aware of the other trial and that Howell is related to these people." *Id.*, p. 97. Tucker was examined in a side-bar conference. *Id.*, p. 98. He said that "the Howells that are in this, I do remember them from the sentencing that we had." *Id.* He remembered both Patrick and Paul Howell. *Id.* The court excused Tucker. *Id.*, pp. 98-99.

Prospective juror Maureen Turner revealed that she

worked at the Tallahassee Democrat in accounting. *Id.*, pp. 138, 144. At side-bar, Mr. Jansen objected to seating Ms. Turner, arguing that she would have knowledge of the Howell case because "the trooper killing case was in the newspaper." *Id.*, p. 145. He asked the court to inquire as to whether she knew the name "Patrick Howell." *Id.*, p. 146. The Government argued that she was in accounting, and warned that asking the question would "undo the thing," that is, the Government's efforts to keep the death of Trooper Fulford out of the case. *Id.* Defendant Marlin Davis's lawyer then pointed out that "[i]t's a two-edge sword. If you ask her whether she knows –" *Id.* Mr. Jansen's request was withdrawn when the Government said it did not intend to call Patrick Howell as a witness. *Id.*, p. 147.

Also related to this claim is Defendant's motion for leave to interview jurors. Doc. 1383. Defendant contends that he cannot fairly make his claims without knowing whether any of the jurors had been exposed to media coverage. The Government filed a response opposing the motion. Doc. 1415.

The Government argues that the change of venue claim, the underlying claim in ground four, is procedurally barred. Doc. 1369, p. 2. The question of change of venue was not raised on direct appeal by Marlin Davis. Emerson Davis argued on direct appeal that the court should have changed venue *sua sponte*, and the Government argued that the claim would be reviewed for plain error. Doc. 1384., Government's brief, p. 47. Again, however, it does not matter that the underlying claim is procedurally barred. The claim here is alleged ineffective assistance of counsel causing the procedural default.

The Government also argues that the underlying claim concerning voir dire of prospective jurors is not cognizable on a § 2255 motion. Doc. 1369, p. 3. Again, the argument is not persuasive since the claim before the court is that counsel was ineffective assistance as to voir dire.

Turning to the merits, the constitution requires that jurors in a criminal trial be impartial. Murphy v. Florida, 421 U.S. 803, 799, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975). But the jurors "need not . . . be totally ignorant of the facts and issues involved." 421 U.S. at 800, 95 S.Ct. at 2036. It is not enough if "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.*, quoting Irvin v. Dowd, 366 U.S. 717, 723, 81 S. Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). Some exposure to pretrial publicity does not create an automatic presumption of prejudice. United States v. Alvarez, 755 F.2d 830, 859 (11th Cir. 1985).

Thus, there are two standards for determining a motion to change venue due to pretrial publicity: actual prejudice and presumed prejudice. Cummings v. Dugger, 862 F.2d 1504, 1509 (11th Cir. 1989). Actual prejudice requires proof that one or more jurors "entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty," and those jurors "could not have laid aside these preformed opinions" and rendered a verdict based upon the evidence. *Id.* Defendant here must proceed on the theory of presumed prejudice as there is no evidence that any juror was actually prejudiced.

"Prejudice is presumed from pretrial publicity when (1) pretrial publicity is sufficiently prejudicial and inflammatory, and (2) the prejudicial pretrial publicity saturated the community where the trials were held." *Id.*, *quoting* Coleman v. Zant, 708 F.2d 541, 544-545 (11th Cir. 1983); Bundy v. Dugger, 850 F.2d 1402, 1424 (11th Cir. 1988). "This principle is rarely applicable and reserved for extreme situations where pretrial publicity renders 'virtually impossible a fair trial by an impartial jury drawn from the community.'" Bundy v. Dugger, 850 F.2d at 1424, *quoting* Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981).

Defendant has not shown that it was impossible to

obtain a fair jury in his case, nor has he shown that his attorney was ineffective either in failing to move for a change of venue or in failing to conduct more extensive voir dire of prospective jurors. The most recent article was on June 9, 1995, eight months before the trial. While the June 9, 1995, article contained an inflammatory falsity, that Emerson Davis "ordered the construction of a pipe bomb to kill two female members of his drug group in 1992,"[11] there is no evidence of any coverage relating to this trial in the months before this trial began. The articles in the fall of 1994 were close to "saturation" coverage at that time, but that was nearly one and one-half years before this trial began. Further, the indictment did not charge anything connected with the murder of Trooper Fulford, and the only connection from the prior media coverage was the mention of Patrick Howell as a potential witness. Patrick Howell was not called as a witness, however. The Government was successful in keeping all references to the killing of Trooper Fulford out of the case, and the mention of a "bombing" occurred inadvertently only once.

While the number of jurors who subscribed to the Tallahassee Democrat is unknown, we know that only about half of the first panel of twelve were subscribers, and only three of those sat on the jury. Subscribers do not tend to read the entire paper each day, and not every subscriber will read the leading articles word for word or necessarily retain a memory of such articles for any length of time.

Further, at the beginning of the case the court described the nature of the charges and read the names of the witnesses, including the name of Patrick Howell, asking the prospective jurors whether the names caused them to believe that they could not serve fairly as jurors. Had any juror made the connection between this case and media coverage of the "trooper bombing" cases or the news articles about the "Jamaican posse," and had that connection caused the

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[11] The evidence was that Paul and Patrick Howell were responsible.

prospective juror any discomfort in serving, this would have been revealed.

Since it was in the interests of Defendant to keep all references to the "trooper bombing" or a "Jamaican posse" out of this case, the court cannot say that the absence of more searching voir dire was not a sound strategic choice by Defendant's attorney. It is true that an attorney could have asked the jurors whether they had read anything in the newspaper about the charges in this case, or whether the names of the prospective witnesses triggered any such memory. Such a question could have been propounded safely, with a caution to that the prospective juror raise his or her hand as an affirmative response so that audible responses could have been taken at the bench.[12]

But still there was the possibility that the asking even these questions might have been enough to inform one of the jurors of the prejudicial connection and yet not elicit enough of a prejudicial response to justify a challenge for cause. Prospective juror Tucker was successfully challenged as much for his connection the Federal Detention Center, where most of the defendants were housed prior to the trial, as his knowledge of the connection of this case to the Howell brothers. Thus, mere knowledge of pretrial publicity might not have been enough to excuse the juror for cause, and Defendant might then have been out of peremptory challenges. It is also possible that the process of questioning about newspaper stories might have triggered a memory arising later, after hearing the evidence. In short, given the lack of saturation news coverage and the deference which the court must apply under Strickland, it cannot be said that it was attorney error not to have asked more questions about pretrial publicity or to have moved for a change of venue.

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[12] Alternatively, the jurors could have been asked this question one by one at side-bar. Individual voir dire is preferred in these circumstances, though it is not required. Cummings v. Dugger, 862 F.2d 1504, 1508 (11th Cir.) *cert. denied,* 490 U.S. 1111 (1989).

There is also the issue of whether Defendant should be permitted now to interview the jurors to see whether such voir dire would have been fruitful. A juror may testify as to "whether extraneous prejudicial information was improperly brought to the jury's attention . . . ." Fed.R.Evid. 606(b). The court has discretion whether to allow post-trial interviews with jurors. United States v. Dominquez, 226 F.3d 1235, 1246 (11th Cir. 2000); United states v. Hooshmand, 931 F.2d 725, 737 (11th Cir. 1991).

While the court recognizes that Defendant is in a difficult position in making his claim without discovery of this sort, there is a strong tradition of protecting the sanctity of a jury, and there first must be a threshold showing of good cause:

> No per se rule requires the trial court to investigate the internal workings of the jury whenever a defendant *asserts juror misconduct. United States v. Barshov*, 733 F.2d 842, 851 (11th Cir. 1984). "The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." *Id.* (citation omitted). To justify a post-trial hearing involving the trial's jurors, the defendant must do more than speculate; he must show "'clear, strong, substantial and incontrovertible evidence . . . that a specific, nonspeculative impropriety has occurred.'" *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) (quoting *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)). "The more speculative or unsubstantiated the allegation of misconduct, the less the burden to investigate." *United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir. 1985).

United States v. Cuthel, 903 F.2d 1381, 1382-1383 (11th Cir. 1990)

Defendant has not shown "clear, strong, substantial and incontrovertible evidence" that his jury must have been tainted by the press coverage. Over eight months had elapsed since the last article, and nearly a year and one-half since the most extensive coverage. There is no evidence that there was any news coverage at the time of this trial. It is unlikely that any of the jurors harbored any unfair preconceptions about Defendant's guilt since the court identified the prospective witnesses, including Patrick Howell, asked the jurors whether the names prompted to conclude that they could not fairly serve as jurors, and no one except Mr. Tucker came forward. In light of the lack of response to that question and the lack of "saturation" press coverage shortly before this trial, Defendant has not shown here anything more than speculation that his juror may have been unfairly prejudiced by the earlier pretrial publicity.

Thus, the motion for leave to interview jurors should be denied. Grounds four and five are without merit.

Ground Six

Defendant contends that his attorney was ineffective for failing to object to vouching and bolstering of the credibility of witnesses who were seeking a reduction of their sentences through substantial assistance motions. The Government again erroneously argues that the underlying claim should have been raised on direct appeal, and fails to address the merits of the claim that counsel was ineffective.

To prove prosecutorial misconduct, which is the underlying claim, a defendant must show that the conduct was improper, and prejudicially affected the substantial rights of the defendant. Sexton v. Howard, 55 F.3d 1557, 1559 (11th Cir. 1995), *cert. denied*, 516 U.S. 1124 (1996). "A prosecutor's vouching 'prejudicially affect[s] the substantial

rights of the defendant when [it] so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process.' In deciding whether the conduct in question rises to that level, we determine whether there is a reasonable probability that, but for the conduct, the outcome of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citations omitted).

Vouching occurs when the prosecutor places the Government's prestige or his own personal belief behind the credibility of the witness:

> A jury could reasonably believe the prosecutor's indications if the prosecutor either places the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity, or the prosecutor implicitly vouches for the witness' veracity by indicating that information not presented to the jury supports the testimony. In short, the government cannot argue the credibility of a witness based on the government's reputation or allude to evidence not formally before the jury.

United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991) (citations omitted). But "it is perfectly proper for a prosecutor to elicit testimony regarding the truth telling portion of a plea agreement on redirect once the credibility of the witness is attacked on cross-examination." United States v. Diaz, 190 F.3d 1247, 1254 (11th Cir. 1999), *citing* United States v. Hilton, 772 F.2d 783, 787 (11th Cir. 1985); United States v. Castro, 89 F.3d 1443 (11th Cir. 1996), *cert. denied,* 519 U.S. 1118 (1997) (questioning a witness about the requirements of a plea agreement to testify truthfully is not improper).

Some portions of the record cited by Defendant in support of this claim are no more than the prosecutor's references to the requirements of plea agreements that the witnesses tell the truth, or the lack of any agreement between the witness and the Government. Doc. 1112, vol. 13, pp. 20-21; doc. 1109, vol. 8, p. 85 (miscited as doc. 1106, vol. 6, in the memorandum); doc. 1109, vol. 10, p. 93-94; doc. 1110, vol. 11, p. 22. Some of the citations to the record are to pages upon which there is nothing that could be construed as "vouching." Doc. 1106, vol. 6, p. 191; doc. 1109, vol. 10, p. 58; doc. 1110, vol. 11, p. 164; doc. 1111, vol. 12, p. 138 (cross examination). The questions asked on redirect of Gregory Bernell Robinson simply asked Robinson whether, when he testified before the grand jury, he was "just saying anything that you wanted to say." Doc. 1109, vol. 10, p. 41. Since none of the cited comments were improper, the failure of the Defendant's attorney to object was not attorney error. Ground six is without merit.

Ground Seven

Defendant contends that Carnell Mason, a witness for the Government, committed perjury when he denied that he had been previously convicted of a felony. Defendant has shown that Mason was convicted of a felony in Savannah, Georgia in 1990.

This is a Brady[13] or a Giglio[14] claim. Brady held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196-97. "A Brady claim is

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[13] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[14] Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). That case, and others, held that knowing use by the Government of false testimony violates due process.

available if either exculpatory or impeachment evidence is suppressed, regardless of the good faith or bad faith of the prosecution." United States v. Fernandez, 136 F.3d 1434, 1438 (11th Cir. 1998). To show a Brady violation, Defendant must show (1) that the prosecution possessed material evidence favorable to the accused (including impeachment evidence), (2) that Defendant did not have the evidence and could not have obtained it through the exercise of due diligence, (3) that the prosecution suppressed the evidence, and (4) that a reasonable probability exists that the outcome would have been different had the evidence been disclosed. United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989), *cert. denied*, 493 U.S. 932 (1989) (citations omitted).

To establish that withheld evidence was material under Brady, Defendant must demonstrate a reasonable probability – "a probability sufficient to undermine confidence in the outcome" – that the outcome of the proceedings would have been different if the evidence had been disclosed. United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985); *citing* Strickland v. Washington.[15] "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995) (discussing Bagley). This is not a sufficiency of the evidence test; rather, a Brady violation is shown "by demonstrating that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S. at 435, 115 S.Ct. at 1566 (footnote omitted).

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[15] In announcing this as the standard, the Court in Bagley adopted the formulation articulated in Strickland for determining prejudice due to ineffective assistance of counsel.

Likewise, "[a] conviction will be set aside for prosecutorial misconduct where the prosecution knowingly introduces false information and there is a reasonable likelihood that the false testimony prejudiced the defendant's rights." United States v. Caporale, 806 F.2d 1487, 1518-19 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1986) (citations omitted), *see also* United States v. Alzate, 47 F.3d 1103, 1109-10 (11th Cir. 1995) (where a prosecutor knowingly used perjured false testimony or failed to correct what he subsequently learned was false, the evidence would be considered material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," which is equivalent to the "harmless beyond a reasonable doubt standard.") (citations omitted).

Defendant has not shown that at the time of the trial, the Government knew of Mason's prior conviction, that the Government suppressed the evidence, or that the verdict was not worthy of confidence in the absence of this evidence discrediting this witness. Therefore, ground seven is without merit.

Motion to amend to bring an Apprendi claim

Defendant has moved for permission to file a supplemental amendment to bring a claim based upon Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Doc. 1395 and 1394 (amended claim). In Apprendi the Court "confirm[ed] the opinion that we expressed in [Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)]. Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362-2363. (emphasis added).

Defendant was charged in count I with having conspired with others to possess with intent to distribute marijuana, cocaine, and crack cocaine in violation of 21

U.S.C. §§ 841 (a)(1) and (b)(1)(A)(iii). Doc. 848 (indictment), p. 2. While the amounts of the drugs were not alleged, the statutory citation put Defendant on notice that the quantities of drugs alleged were 1000 kilograms or more of marijuana, 5 kilograms or more of cocaine, or 50 grams or more of crack cocaine, and that the maximum prison sentence for any of the three was life imprisonment. United States v. Nealy, 232 F.3d 825, 830 and n. 5 (11th Cir. 2000) (noting in dicta "that the indictment likely only needs to reference the statute"), *citing*, United States v. Fern, 155 F.3d 1318, 1325 (11th Cir. 1998). As set forth in Fern, "[i]f an indictment specifically refers to the statute on which the charge was based, the reference to the statutory language adequately informs the defendant of the charge." *Id.*

The jury, however, was not asked to find the amounts of those drugs beyond a reasonable doubt. Defendant contends that as a consequence of Apprendi, his maximum sentence is 20 years, the sentence provided by 21 U.S.C. § 841 (b)(1)(C).

There may be problems with the timeliness of this new claim under the one year limitation of 28 U.S.C. § 2255. The claim does not relate back to earlier claims because Defendant did not claim in his initial motion that he as denied due process because the jury did not find drug amount beyond a reasonable doubt. *See*, Davenport v. United States, 217 F.3d 1341, 1344 (11th Cir. 2000). However, the heart of the matter is whether Apprendi has been "made retroactively applicable to cases on collateral review." The one year period for filing an initial § 2255 claim runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255, first subparagraph (3). If Apprendi is "made retroactive" by the appropriate courts, Defendant's initial one year will begin to run from that date.

With regard to whether Apprendi has been or should be applied retroactively on collateral review, the cases are in serious conflict. *Compare* United States v. Brown, No. 3:93cr262, 2000 WL 1880280 (N.D. Tex., Dec. 28, 2000) and Ware v. United States, No. 3:00-0262, 2000 WL 1827590 (M.D. Tenn., Dec. 8, 2000) *with* Darity v. United States, No. 1:95cr132, 2000 WL 1804737 (W.D. N.C., Oct. 25, 2000), *rehearing denied*, 2000 WL 1804736 (Dec. 4, 2000) and United States v. Murphy, 109 F.Supp.2d 1059 (D. Minn. 2000). The difference in result depends upon whether Apprendi concerns only a rule of criminal procedure or substantive criminal law. If Apprendi established substantive law, Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) does not govern the retroactivity analysis. Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). If it is merely a rule of criminal procedure, then Teague will dictate that Apprendi is not retroactive.

The more persuasive view is that Apprendi establishes substantive law. As our circuit recently held, drug quantity is an *element* of the conspiracy offense which *must* be charged in the indictment and proved to the jury beyond a reasonable doubt. United States v. Shepard, __ F.3d __, No. 00-10653, 2000 WL 1839206, *1 (11th Cir., Dec. 14, 2000). One cannot get more substantive than an announcement regarding the elements of offenses and what must be in indictments. To say that shifting the fact finding from the sentencing judge to jury is procedural is true in a technical sense, and was a correct application of Teague before Bousley was decided,[16] but overlooks the clarification of Teague analysis established by Bousley.

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[16] *See* United States v. Swindall, 107 F.3d 831 (11th Cir. 1997). Swindall applied Teague to find that United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), holding that the issue of materiality in false statement prosecutions must be decided by the jury, would not apply retroactively on collateral review.

But this court need not decide these difficult questions in this case. Even if timely and even if Apprendi applies retroactively, Defendant's claim stumbles due to procedural default. Defendant did not raise this claim at trial or on direct appeal and the claim is procedurally defaulted. The court therefore looks instead to whether Defendant can demonstrate cause and prejudice to excuse his procedural default, or whether he has shown actual innocence. Bousley v. United States, 523 U.S. at 620, 118 S.Ct. at 1610-1612. The cause and prejudice test applies even though Apprendi was decided after Defendant's conviction became final. *See*, Pitts v. Cook, 923 F.2d 1568, 1571, n. 5 (11th Cir. 1991) (rejecting the argument that claim there was so novel that the failure to raise it could not constitute procedural default). Instead, legal novelty can constitute cause only if "the legal basis for the claim was not reasonably available to petititoner's counsel." *Id.*, at 1571, *citing*, Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910, 82 L.Ed.2d 1 (1984); Bousley, 523 U.S. at 622, 118 S.Ct. at 1611 (also citing Reed).

It cannot be said that the claim which was successful in Apprendi was not reasonably available before then, such that counsel for Defendant "lacked the tools" to construct it. 923 F.2d at 1572 (citation omitted). This is so because, as previously noted, in Apprendi the Court confirmed what it had expressed in Jones, 120 S.Ct. at 2362-2363. Jones had set forth the constitutional principle in dicta, to support the Court's interpretation of a statute that certain provisions were elements rather than sentencing factors, because otherwise "the statute would be open to constitutional doubt *in light of a series of cases over the past quarter century*, dealing with due process and the guarantee of trial by jury." 526 U.S. at 240, 119 S.Ct. at 1222 (emphasis added). The discussion of those cases in Jones reveals that the tools for *making* the claim ultimately successful in Apprendi were available well before Defendant's conviction in this case. That the claim

had been rejected in this circuit both before and after Jones[17] (as well as almost all of the others) does not constitute cause for the default. Bousley, 523 U.S. at 623, 118 S.Ct. 1611 ("futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'") (citation omitted).

Ineffective assistance of counsel may constitute cause for a procedural default, of course. But the fact that a claim is newly clarified or articulated by the Supreme Court, yet not so novel that novelty itself is cause for the default, does not mean that counsel was unreasonable for failing to raise it. Pitts, 923 F.2d at 1571-1573. "[T]here will often be a 'gap' between the spheres of novelty and ineffective assistance of counsel," *Id.* at 1573-1574 (citations omitted), and counsel's failure to raise an Apprendi claim prior to Apprendi and Jones is not ineffective assistance of counsel in the constitutional sense. This is especially true where the claim was not supported by circuit precedent. *Cf.*, Williamson v. Moore, 221 F.3d 1177, 1180 (11th Cir. 2000) (finding that a reasonable attorney would not have pursued a self defense theory for a number of reasons, one of which was that "in trial counsel's experience, self-defense arguments did not have a high rate of success in that jurisdiction.").

In summary, it was not attorney error for Defendant's trial lawyer to fail to make the Apprendi claim. Further, there was no impediment to the making of the claim. For these reasons, cause for the default has not been shown.

Thus, the only way Defendant can successfully bring an Apprendi claim now is by showing that he is actually

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[17] *See*, United States v. Hester, 199 F.3d 1287, 1290-92 (11th Cir. 2000), *vacated and remanded in light of Apprendi*, 121 S.Ct. 336 (Oct. 16, 2000) and *overruled* (due to Apprendi) in United States v. Rogers, 228 F.3d 1318 (11th Cir. 2000). In Hester the court noted that before Jones it had "clearly rejected the characterization of the amount of drugs as an element of the offense under § 841," and found that Jones did not require a contrary result. *Id.* (citations omitted).

innocent with respect to the sentence of 360 months. Defendant has not made such a showing. As previously discussed, he has not shown that the court's finding at sentencing based upon the trial evidence, that he was involved with more than 1.5 kilograms of crack cocaine, was wrong. Defendant was sentenced to 360 months, less than the 480 months authorized for a conspiracy to possess with intent to distribute 5 *grams* or more of cocaine base. 21 U.S.C. § 841 (b)(1)(B). Defendant has not shown that he is actually innocent of involvement in a conspiracy to possess 5 grams or more of crack cocaine.

Thus, even though the Government did not oppose the motion to amend, doc. 1415, p.2, amendment to bring an Apprendi claim would be futile. Amendment need not be allowed where it would be futile to add new claims. Galindo v. ARI Mut. Ins. Co., 203 F.3d 771, 777 n. 10 (11th Cir. 2000). Therefore, the court should exercise its discretion and deny the motion to amend. Alternatively, the court may wish to grant the motion to amend and reach the merits of the procedural default issue, which is dispositive of the claim.

For these reasons, it is **RECOMMENDED** that Defendant Marlin Davis's motions for leave to interview jurors, doc. 1383, and to amend to bring an Apprendi claim, doc. 1395, be **DENIED**, and his motion to vacate and set aside a sentence filed pursuant to 28 U.S.C. §2255, doc. 135, be **DENIED WITH PREJUDICE**.

IN CHAMBERS at Tallahassee, Florida, this 8th day of January, 2001.

/s/ William C. Sherrill, Jr.
WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

Appendix H

Order Denying Defendant's Section 2255 Motion, Entered February 22, 2001

Appendix H

[Entered February 22, 2001 - Doc. 1458]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA,

v. 4:92cr13-WS

MARLIN DAVIS, 4:99cv522-WS

Defendant.

ORDER DENYING DEFENDANT'S SECTION 2255 MOTION

Before the court is the magistrate judge's report and recommendation (doc. 1439) docketed January 8, 2001. The magistrate judge recommends that the defendant's motion to vacate and set aside sentence be denied.

Defendant filed objections (doc. 1450) to the report and recommendation, and these objections have been included in the court's de novo review of the record. For the reasons discussed at length by the magistrate judge, this court finds that Defendant is not entitled to relief on any of the grounds raised in his motion to vacate.

Accordingly, it is ORDERED.

1. The magistrate judge's report and recommendation is adopted and incorporated by reference in this order of the court.

2. Defendant's motion to vacate, set aside, or correct sentence (doc. 1325) is DENIED with prejudice.

3. The clerk is directed to enter judgment accordingly and to close Case No. 4:99cv522-WS.

4. Defendant's motions for leave to interview jurors (doc. 1383) and to amend to bring an Apprendi claim (doc. 1395) are DENIED.

DONE AND ORDERED this 21st day of February, 2001.

/s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

Appendix I

Judgment Denying Defendant's Motion To Vacate, Set Aside, or Correct Sentence, February 22, 2001

Appendix I

[Entered February 22, 2001 - Doc. 1459]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA,

VS CASE NO. 4:92cr4013-WS

MARLIN DAVIS,
_____/

JUDGMENT

Pursuant to and at the direction of the Court, it is ORDERED AND ADJUDGED that the Defendant's motion to vacate, set aside, or correct sentence is DENIED with prejudice.

ROBERT A. MOSSING, CLERK

February 22, 2001 /s/ Angela M. Maxwell
DATE Angela M. Maxwell
Deputy Clerk

Appendix J

Marlin Davis' Motion For Rehearing From February 22, 2001 Order And Judgment [Filed March 8, 2001 – Doc. 1462]

Appendix J

[Filed March 8, 2001 – Doc. 1462]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES
OF AMERICA

v.

CASE NO. 4:99cv522-WS
RELATED CASE NO.
4:92cr4013

MARLIN DAVIS
_____/

MARLIN DAVIS' MOTION FOR REHEARING FROM FEBRUARY 22, 2001 ORDER AND JUDGMENT

This Court by its final judgment entered on February 22, 2001, denied relief requested by Marlin Davis' Motion filed pursuant to 28 USC § 2255.

The judgment and order of this Court affirmed and approved the Magistrate's Report to which Marlin Davis filed timely objections. Marlin Davis' counsel also had requested leave for oral argument in reference to the objections to the Magistrate's Report, a matter solely within the discretion of this Court. The Government chose not to file any response to Marlin Davis' objections or any document in support of the Magistrate's findings.

Without abandoning any of the grounds that had been urged, it is respectfully suggested that special reconsideration be given to the *Edwards* related issues. Marlin Davis also

would suggest in reference to ethnicity issues, that this Court is the most appropriate forum to implement the protection of the constitutional principals. *Batson v. Kentucky*, 481 U.S. 476, 85 (1986) (We have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system.) This is particularly true because this Court, as pointed out in the Objections to the Magistrate's Report, had demonstrated its full willingness to provide a fair trial free of ethnicity issues if Court appointed trial counsel had objected. It should also be noted that Government counsel had an equally affirmative duty to avoid ethnicity. The verdict resulted from the "Jamaican" versus "American" strategy as set forth in the record excerpts filed with this Court.

The *Edwards* line of cases provides a prompt and dispositive resolution of the 2255 Motion that is fully in accord with *Apprendi*. Rehearing is especially warranted because the Magistrate's Report (Doc. 1439) erred in finding use of marijuana was not introduced in the Government's case by testimony elicited by the Government from the Government's witnesses.

> The testimony on these pages has been carefully examined and it only concerns personal possession or use of marijuana by the witnesses, evidence which was elicited not by the Government, but on cross examination by attorneys for Defendants to discredit the witnesses. The one exception is testimony of Gregory Matthews, where he admitted to "selling" and smoking marijuana, abut again this was elicited by Defendants in an attempt to discredit Matthews. Doc. 1120, p. 16. It was not evidence presented by the Government. 1439 at 8.

The Report is not correct. In addition to this error, the Report failed to recognize that government witnesses frequently testified in support of the government conspiracy case using "drugs" and "dope." As the Government brought

out in direct examination, government witnesses used the term "drugs" to include marijuana. The Magistrate and apparently this Court on review of the Magistrate's Report did not consider the direct marijuana testimony the impact that Government testimony referring to "drugs" included marijuana.

This can be demonstrated by just a small portion of the trial transcript.

A: They sold **drugs**.

Q: What type of **drugs**?

A: Crack cocaine.

Q: All right. Specifically referring to **Bounty**, did he sell anything other than crack cocaine?

A: **Marijuana**.

Q: Did Bounty work a regular job?

A: No, sir, not to my knowledge, not in Marianna.

Q: How was it that you met Emerson Davis?

A: He came over with Bounty, and Bounty introduced me to him.

Q: Did you and he become attracted to one another?

A: Yes.

Washington – Direct, R8-1120-122.

Q: Now, you never told the police that you hid the **marijuana** on the night of the arrest, did you?

A: No, I didn't.

Q: Who knew that you hid the **marijuana** on the night of the arrest?

A: I might have told Emerson or Mark.

Ford – Redirect, R5-1105-151-52.

Q: And he asked you whether or not Mercy had any **dope**.

A: No.

Q: Was there anybody else in the apartment with you?

A: Garfield.

Q: Did Garfield have any **dope** on him?

A: We was in the room, and Mercy asked Garfield, "Do you have any **dope**?"

Garfield said no, but then we are going to the room and Mercy said he find Garfield with a pack of **weed**, so he took it from him. And so when we started questioning him, he said, "Don't let people in here find us with dope. So whatever you have on your person or don't use, just get rid of it." So he went in the back and he –

Q: Flushed it?

A: Yes.

Matthews – Redirect, R8-1120-92.

* * *

Q: Okay did any of the other people of Jamaican decent who were up in the Garden you already testified about who were selling **drugs** up there, did any of them ever bring money into your house as well?

A: Yes, if I'm not mistaken I think Jubee and Bounty.

R9-1108-6.

* * *

Q: Was there any **drugs** dealing in the Marianna Gardens Apartments before the Jamaican came?

A: No sir, not that I know of.

Bailey – Redirect, R9-1108-194

* * *

Q: Now were there any other Jamaicans up in the Marianna Gardens Apartments who were working with Mercy?

A: Well, not really, **Bounty** and all them was up there Bounty, Jubee, Garfield was working for them too.

Borders – Direct, R9-1108-201

* * *

Prosecutor:

Q: All right. When you were living in the Marianna Garden Apartments, did there ever come a time when people of Jamaican descent started coming to the Marianna Garden Apartment?

A: Yes.

Q: And who were the first ones that – that you knew to be of Jamaican descent that came to the Marianna Garden Apartments?

A: Mercy.

Bailey – Direct, R9-1108-113.

* * *

Prosecutor:

Q: Was there **drugs** dealing in the Marianna Garden Apartment before the Jamaican came?

A: No sir, not that I know of.

Bailey – Redirect, R9-1108-194.

* * *

The crux of the Government's conspiracy case was a simple abc: (a) Jamaicans, (b) drugs, (c) Marianna Garden Apartments. The drugs included marijuana. Under the very language of the report, this Court should vacate and remand

for further proceedings or enter an order resentencing Marlin Davis based on marijuana:

> In short, while a different case might be presented had the government presented any evidence of a conspiracy to possess with intent to distribute marijuana, here the Government put on *no* evidence marijuana was an object of the conspiracy. Thus, there is no ambiguity about the jury verdict with respect to whether the jury could have found that Defendant conspired to possess with intent to distribute marijuana. Stated another way, had Defendant been charged only with a conspiracy to possess with intent to distribute marijuana, he would have been entitled to a judgment of acquittal. The jury, therefore, must have convicted him only of involvement with cocaine and crack cocaine. Doc. 1439 at 9-10.

Under *Edwards* the sentence for marijuana would be time served. Under the Magistrate's test, we would also suggest a judgment of acquittal would have been proper for cocaine and crack cocaine.

In the *United States v. Pace*, 981 F.2d 1123, 1129 (10th Cir. 1992), the Tenth Circuit recognized that "dope" or "drugs" creates a reference to multiple substances that could be involved in the conspiracy:

> The transcript, however, also includes approximately thirty references to "dope" or "drugs," which might refer to either drug. There were a few references to both drugs, including that certain chemicals are "precursors that are used to manufacture amphetamine and methamphetamine..."

In this case the indictment, the testimony, the jury instructions, the verdict, the Pre-Sentence Report, and the judgment all included marijuana.

***

[OMITTED]

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CONCLUSION

Rehearing should be granted. The Magistrate's Report should be vacated for appropriate modification.

Respectfully submitted this 8th day of March, 2001.

/s/ William VanDercreek
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Terry Flynn, Assistant United States Attorney, 111 North Adams Street, 4th Floor, Tallahassee, Florida 32301 this 8th day of March, 2001.

/s/ William VanDercreek
ATTORNEY